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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THOMAS R. LOMBARD.

PUTNEY M. MILNER,
CARLOS IÇAZA,
A. AND L. S. CARRINGTON,
Counsel for Respondent.

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MAY IT PLEASE THE COURT:

The Court has graciously allowed us to supplement our argument because our original Brief was written before petitioner's Brief was received.

Petitioner urges the decree in this case is not final as to stipulator's surety because no judgment was rendered against the surety and cites on Page 3 of his Brief:

"2nd Circuit—*The Lydia*, 1 Fed. (2) 18,
" *The Buckhannon*, 229 Fed. 519,
" *The Cartona*, 297 Fed. 827,
" *The William Jamison*, 67 Fed. (2) 290."

And further that the decree is not joint—and hence is not controlled by your Honors' decision in *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169, where your Honors held that the judgment was joint in form and hence the surety on the appeal bond was a necessary party and must join in the appeal, and the time for appeal having lapsed the matter was jurisdictional and the appeal was dismissed.

First, as to the *finality* of the decree;

It is a decree on the merits, after trial for a definite sum of money against respondent claimant, and execution ordered if no appeal be taken within ten days, the statutory time, against Hans Elliot respondent and the United States Fidelity and Guaranty Company, his stipulator for costs and value, their goods, chattels and lands to satisfy this decree. The petitioner seems to endeavor to take advantage of a repetition of the words "ordered, adjudged and decreed" in relation to execution. We earnestly suggest that these words are surplusage, unnecessary. Once "ordered, adjudged and decreed" was amply sufficient and after decreeing liability in principal and taxing costs, "with interest thereon until paid;" the decree (leaving out the repetition of "ordered, adjudged and decreed") could have continued as follows: "and unless this decree be satisfied."

The decree is palpably a "joint" judgment against Hans Elliot and his surety on forthcoming bond because otherwise the order for execution against the stipulator's surety would be futile and meaningless because no execution can issue against any one until there is first a final judgment against him.

We believe this Court will declare this decree to be on its face a joint judgment, as permitted by statute in the original decree, against the United States Fidelity and Guaranty Co., Hans Elliot's stipulator surety. As your

Honors held in *Hartford Accident Co.* v. *Bunn*, 285 U. S. 178, the judgment is joint in form:

> "In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty."

As was said in *Estis* v. *Trabue*, 128 U. S. 225 (229):

> "There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants and *execution is awarded against* all of the parties jointly.
>
> "In such a case, sureties have the right to a writ of error. *Ex parte Sawyer*, 21 Wall. 235, 240. It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such a writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Just a word on the citation of *The Lydia*, 1 Fed. (2) 18, and all cases from the Second Circuit Court of Appeals. The decrees are never ~~joint~~ final because, as stated by Judge Hough, referring to the Supreme Court's ruling in *Re Sawyer*, 21 Wall. 235-240, he said (p. 21): "That decree provided that, unless an appeal be taken, 'a summary judgment' be entered in favor of libellants against the sureties, naming them: *Whereas, under the practice followed here, it is necessary to issue an order to show cause against the sureties,* and *no execution can issue against them until after they have been heard* and such objections as they may make have been overruled. Yet in the *Sawyer* case it was

held that the decree was not final and did not authorize an appeal. As we have power to consider only appeals from final decrees in admiralty it is clear that the Surety Company has no technical standing in this Court."

We respectfully urge in view of the practice in the Second Circuit Court of Appeals, *The Lydia* and other cases are not parallel or in point.

The court also said:

> "In the Fifth Circuit a final decree seems to be in effect a final judgment against the stipulator by name, and it was held that such stipulator was a necessary party on appeal, unless a severance was had." *The Bylands*, 231 Fed. 101, 145 C. C. A. 289.

We respectfully submit that "*The Cartona*," 297 Fed. 87, where indemnitor to surety tried to appeal has no application to this case. Also that "*The William Jamison*," 67 Fed. (2) 290, was a case of joint and several liability. The suggestion is made that because a stipulator's surety has no control over the case or its trial, that, therefore, he has not the right of appeal. Manifestly this is true only up to the point that he is, under the practice, condemned or a joint decree entered against his stipulator and self. From and after that point he is entitled to appeal under the well recognized and elementary law, so ably stated by Judge Hough in "*The Lydia*," 1 Fed. (2) 21, as follows:

> "It is almost elementary that any one upon whom a *judgment or decree directly, immediately,* and *necessarily operates* may appeal from it so far as it effects himself. Thus it has been held that 'sureties on the stipulation (for value) are entitled to appeal from any decree that may be rendered against them." *Ex parte Sawyer*, 21 Wall. 235.

It has been held differently as to surety for costs.

In *Davis* v. *Preston*, 280 U. S. 406 held: A surety not interested in the controversy on the merits cannot appeal

though included in the judgment. In that case the surety was only surety for costs, not value.

In the present case, the stipulation of surety is for value. And in our Civil Law Practice even a third person interested and directly affected may appeal from any judgment.

Finally, petitioners by leave of court have introduced the Rules of the Fifth Circuit Court of Appeals on subject of supersedeas.

It is to be noted that as appears at Trans. p. 108 the court having granted the appeal (our original brief p. 14) in chambers, did in *open* court say: "It is now ordered in open court that the supersedeas bond be and is hereby fixed in the sum of $10,000, and that the cost bond on appeal be and is hereby fixed in the sum of $250.00."

Petitioner's counsel cites (for what purpose we do not know) Rule XIII, reading "or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and just damages for delay, and costs and interest on appeal."

The supersedeas bond for $10,000 having been fixed in open court without objection of respondent, it must be presumed it was satisfactory to him; otherwise he would have moved to reduce it, which he did not do. He failed to furnish any supersedeas bond.

If his offer is in the nature of any objection to the amount of bond at this time, it is manifestly entirely too late.

Respectfully submitted,

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(4690-C)